

REDACTED

GENERAL COUNSEL  
OF COPYRIGHT

Before the  
COPYRIGHT ARBITRATION ROYALTY PANELS  
Library of Congress

DEC 2 1997  
RECEIVED

In the Matter of )  
 )  
Adjustment of the Rates for ) Docket No. 96-6  
Noncommercial Educational ) CARP NCBRA  
Broadcasting Compulsory License )

**RESPONSE OF THE PUBLIC BROADCASTERS TO ASCAP'S  
OBJECTION TO THE PUBLIC BROADCASTERS' REQUEST FOR  
BIFURCATED PROCEEDINGS AND MOTION TO STRIKE  
CERTAIN PORTIONS OF THE PUBLIC BROADCASTERS'  
DIRECT CASE RELATING TO THE COLLECTIVE FEE STATED**

The Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and the stations on whose behalf they seek rates in this proceeding (collectively, the "Public Broadcasters") hereby respond to ASCAP's Objection to the Public Broadcasters' Request for Bifurcated Proceedings and Motion to Strike Certain Portions of the Public Broadcasters' Direct Case Relating to the Collective Fee Stated (herein "ASCAP Opposition").

**ARGUMENT**

**I. ASCAP'S OBJECTION TO THE PUBLIC BROADCASTERS' REQUEST TO BIFURCATE THIS PROCEEDING AND ITS MOTION TO STRIKE THE COLLECTIVE FEE ARE WITHOUT STATUTORY, REGULATORY OR PRECEDENTIAL SUPPORT**

In an effort to avoid the merits of the concept of bifurcation (see Public Broadcasters' Motion To Bifurcate, filed November 14, 1997), ASCAP raises a series of

insubstantial -- to the point of frivolous -- procedural objections to bifurcation. We address and dispose of each of them briefly below. The following discussion also demonstrates the lack of substance to ASCAP's motion to strike the collective fee requested by the Public Broadcasters.

A. Nothing In Section 118 Of The Copyright Act Or In Its Legislative History Prevents Resort Here To A Bifurcated Proceeding

ASCAP twists the legislative history of § 118 of the Copyright Act, as well as § 118's plain language, to reach the unfounded conclusion that the two-step process of rate-setting here proposed by the Public Broadcasters is somehow "impermissible." Neither § 118, nor its legislative history, in any way inhibits the Register of Copyright and the Librarian from procedurally ruling under § 801(c) of the Copyright Act that this CARP should be conducted as urged by the Public Broadcasters.<sup>1</sup>

1. ASCAP cites to irrelevant-for-these-purposes changes to the proposed workings of § 118 which were made between Senate and House drafts of the Act. See ASCAP

---

1. ASCAP, in requesting that bifurcation be denied, recognizes that § 801(c) of the Act places this issue in the discretion of the Copyright Office and the Librarian. See ASCAP Opposition at 15.

Opposition at 3-6. What occurred through the amendment process was a modification of the procedure by which compulsory license fees would be paid by public broadcasters. The Senate bill called for fees to be tendered by public broadcasters to the Copyright Office, pursuant to one or more fee schedules determined by negotiation or by the former Copyright Royalty Tribunal, against which claims would be made by interested copyright owners. The House version (which was adopted as the present § 118) provided that, in the case of failed negotiations, the CARP would determine the appropriate fees payable to copyright owners, following which payments would be made directly to the copyright owners by public broadcasters. This change, which was dictated by the interest in avoiding unnecessary administrative costs associated with the government's disbursing of royalties so collected, has absolutely nothing to do with the issue now before the Copyright Office: whether the most efficient means of arriving at appropriate ASCAP and BMI fees is in two steps, rather than one. Bifurcation of this proceeding would not require the collection and disbursement of fees by the Copyright Office or the CARP or otherwise contravene any of the concerns addressed through the amendment process. ASCAP

and BMI will, at the end of a bifurcated process, have the "individual rates" to which they are entitled under § 118, and they will receive them directly from the Public Broadcasters -- both as dictated by (and entirely consistent with) § 118.

2. Even flimsier is the argument that § 118's reference to "rates," as opposed to "a rate," somehow forecloses resort to a two-stage rate-setting process. See ASCAP Opposition at 6-7. Section 118 nowhere mandates that public broadcasters must, to the exclusion of alternative approaches to arriving at appropriate royalties, quote a separate individual "rate" for each copyright owner affected by § 118. Indeed, by ASCAP's own logic, the Public Broadcasters should have quoted a proposed rate for each of ASCAP's thousands of copyright-owner members -- a proposition which, we assume, even ASCAP would not support. Section 118's reference to "rates" in the plural encompasses no more and no less than the recognition that § 118 contemplates the licensing of multiple copyright rights -- to wit, "published nondramatic musical works and published pictorial, graphic, and sculptural works" -- hence, the need to establish appropriate "rates and terms" covering these multiple rights. Following determination of the collective

value to the Public Broadcasters of the ASCAP and BMI repertories, ASCAP and BMI each will (either by agreement between them or by CARP determination) receive the "individual rate" to which they are entitled.

3. ASCAP's corresponding motion to strike the Public Broadcasters' collective fee request (see ASCAP Opposition at 8) based on the Public Broadcasters' asserted failure to quote separate rates applicable to ASCAP and BMI individually should be denied for the reasons set forth above. Neither § 118 nor § 251.43(d) of the CARP Rules places such a requirement on the Public Broadcasters. They have discharged their obligation by setting forth their estimate of the value of the music here in issue -- that licensed by ASCAP and BMI combined. To force the Public Broadcasters to quote separate fees would entail an expenditure of resources on a task for which they are ill-equipped: the determination, as between ASCAP and BMI, of the degree of usage of their respective repertories on public radio and television. In circumstances where ASCAP and BMI have themselves put forward in their direct cases totally disparate methodologies for undertaking such a task, it would be unfair and wasteful in the extreme for the Public Broadcasters to be forced to engage in such an

exercise. The division of royalties between ASCAP and BMI is of no consequence to the Public Broadcasters; a Phase II, to which the Public Broadcasters do not wish to be, and need not be, parties, is the appropriate forum in which to hash out these competing claims.<sup>2</sup>

4. Finally, if, contrary to what the Public Broadcasters believe to be appropriate, the Copyright Office were to determine that the Public Broadcasters' proposed rate is in some measure deficient, § 251.43(d) makes plain that the appropriate remedy is not, as ASCAP suggests, the preclusion of any fee request by the Public Broadcasters, but, instead, the revision of that proposal.<sup>3</sup>

---

2. This point is underscored in ASCAP's November 19, 1997 Opposition to the Public Broadcasters' Motion to Compel Discovery, wherein ASCAP observes that "ASCAP surveys and measures the use of its members' music differently and compensates its members differently than does BMI or even SESAC. . . . Although the Public Broadcasters may desire that the [Copyright] Office, and the CARP, once convened, accept their argument that music is entirely fungible and that they should be permitted to measure it the same way and value it in equivalent terms, their position ignores the reality that ASCAP, BMI, and SESAC are competitors."

We agree. As competitors, ASCAP and BMI can contest with one another whose repertory has greater "value" and whose technique for measuring music use is competitively more attractive. These, however, are not issues of moment to the Public Broadcasters, who should not be dragged into this competitive cross-fire.

3. The Orders of the Copyright Office cited by ASCAP (see ASCAP Opposition at 8) are inapposite, since each dealt with  
(continued...)

B.    The Sole Precedent Under Section 118 -- The  
1978 CRT Ruling As To ASCAP Fees -- Does Not  
Argue Against A Bifurcated Proceeding Here

In its search for a procedural bar to a two-phase rate-setting process here, ASCAP grotesquely mischaracterizes a 1978 ruling by the Copyright Royalty Tribunal. ASCAP mistakenly asserts that in that ruling (set forth at Exhibit D to ASCAP's Opposition), "the CRT explicitly recognized its obligation to set rates for each licensing organization," having allegedly "invited and heard presentations concerning individualized rates for each performing rights organization. As in this proceeding, the Public Broadcasters proposed that their evidence not relate to individual copyright owners, but rather to owners as a whole." See ASCAP Opposition at 7.

We can only wonder at this exercise in creative writing by ASCAP, against the fact that the 1978 CRT proceeding involved solely the setting of a rate as to ASCAP (the Public Broadcasters having negotiated terms with BMI and SESAC). There was, therefore, no occasion for the CRT to "explicitly recognize[] its obligation" to hear separate

---

3. (...continued)  
a failure of a party to state a specific rate sought via the CARP proceeding. The Public Broadcasters have so specified, albeit in a fashion not to ASCAP's liking.

testimony as to each licensing organization nor (as ASCAP would imply), to set "individualized rates" for multiple copyright claimants.

The far more limited statement made by the CARP in the context presented -- the need to determine one rate for one performing rights organization -- was that:

it has wide discretion in determining the structure of the rate schedule, and providing for different treatment of copyright owners or public broadcasting entities on the basis of reasonable distinctions rooted in relevant considerations. The CRT has also determined that it has the authority, which it has chosen to exercise, to establish separate schedules of rates for the repertory of certain performing rights licensing organizations.

43 Fed. Reg. 25,068 (1978) (emphasis added). The CRT was thereby indicating that it did not feel itself bound, in setting rates for ASCAP, by the negotiated rates arrived at with BMI and SESAC. The observation that it had the "discretion" and "authority," in a litigation involving the rate payable to one performing rights organization, not simply to follow the fee schedules privately negotiated with the two remaining organizations, scarcely provides support for ASCAP's position here.<sup>4</sup> We are dealing with the rate

---

4. At that, the CRT was careful to observe that it "does not intend that the adoption of this schedule should  
(continued...)

requests of two organizations here, not one; the same "discretion" and "authority" as reposed in the CRT to determine the optimal means of adjudicating a just result as to ASCAP in 1978 lies with the Copyright Office and the Librarian under § 801(c) of the Act in this CARP proceeding. The Public Broadcasters believe that, in the setting here presented, the optimal approach is to arrive at reasonable license fees in the aggregate for the Public Broadcasters and, at the end of the process, individually for ASCAP and BMI.

ASCAP's oblique analogy to prior ASCAP "rate court" proceedings is no more availing. See ASCAP Opposition at 6. Indeed, in the most significant such proceeding to date, involving the fee circumstances of some 1,000 local television broadcasters, the presiding judge adopted a closely analogous approach to fee-setting as that proposed here. As against ASCAP's contention that it was entitled to receive fees pursuant to a formula which would yield different individual fees for each broadcaster, the court awarded ASCAP a single, annual industry-wide fee covering all of the broadcasters -- leaving it to the

---

4. (...continued)  
preclude active consideration of alternative approaches in future proceedings." 43 Fed. Reg. at 25,069.

parties (and the court, if necessary) to determine an appropriate allocation among the broadcasters. It was only by examining the overall fee consequences of ASCAP's fee proposal that the court was able to arrive at a reasonable fee. See United States v. ASCAP (In the Matter of the Application of Buffalo Broadcasting Co.), 1993-1 Trade Cas. (CCH) ¶ 70,153 (S.D.N.Y. Feb. 26, 1993).<sup>5</sup>

The Public Broadcasters' bifurcation motion is founded on the same premise: that it is only by examining the total fee impact upon public broadcasting of the pending ASCAP and BMI proposals that a fair outcome can be arrived at. A two-phase proceeding will enable precisely such an evaluation.

C. There Is Ample Time For Conclusion  
Of A Two-Phase Proceeding

Contrary to ASCAP's suggestion (see ASCAP Opposition at 7), the six-month period allotted for

---

5. Judge Conner, in his review of the trial court's rulings as applied to certain of the broadcast-applicants, approved the approach adopted by the trial court and "reject[ed] ASCAP's attempt to have [the court] look only to fee-setting methodology while ignoring the actual dollar figure that results therefrom." United States v. ASCAP (In the Matter of the Applications of ABC, CBS, and NBC), 157 F.R.D. 173, 198 (S.D.N.Y. 1994). Judge Conner further observed that "any approach that completely ignores the actual fee burden resulting from a particular formula fails properly to consider the reasonableness of the fee itself." Id.

conclusion of the CARP should be more than adequate to accommodate a bifurcated proceeding. The overall quantity of evidence to be adduced will not be enlarged by a two-phase proceeding -- it will merely be distributed between a Phase I and a Phase II. Even if Phase I hearings were to last several weeks, this should leave more than enough time for the CARP to render its Phase I ruling, and thereafter for ASCAP and BMI to present their respective cases in Phase II, a task rendered easier by the absence of an unnecessary third party (the Public Broadcasters). Far more complex cases have been tried and determined within the time period allotted here.

**II. ASCAP'S MOTION TO STRIKE REFERENCES TO LICENSE FEES ESTABLISHED BY PRIOR VOLUNTARY AGREEMENTS SHOULD BE DENIED**

In what can only be regarded as a desperate effort to avoid the CARP's being exposed to perhaps the most relevant data in the entire proceeding -- the amounts of license fees paid to ASCAP and BMI combined over the past license period (so as to enable examination of the extraordinary implications of the fee requests made herein by ASCAP and BMI) -- ASCAP moves to strike all references to that number (as well as the combined fee proposal made by the Public Broadcasters for the 1998-2002 period). See

ASCAP Opposition at 9-14. ASCAP's asserted basis is boilerplate language contained in the past three license agreements between ASCAP and the Public Broadcasters stating that the fees agreed to are to have "no precedential value," inter alia, in any future proceedings "between the parties." Id. at 10 (emphasis added).

A. Whatever evidentiary implications such language might have had in a two-party proceeding "between the parties," wherein the focus of inquiry was solely on an appropriate license fee for ASCAP, this language has no evidentiary implications in the current setting, where (a) we are engaged in a three-party proceeding, and (b) the Public Broadcasters rely on the 1992 ASCAP agreement not to determine an appropriate fee vis-a-vis ASCAP, but rather to extrapolate a reasonable overall music license fee payable to ASCAP and BMI combined. As previously stated, the Public Broadcasters have no interest in the ultimate division of the overall "pie" between ASCAP and BMI, and in fact take no position on an appropriate individual fee for either organization. Nowhere do ASCAP's papers address this salient distinction.

ASCAP's case law (see ASCAP Opposition at 12-13) is, accordingly, inapposite, since the Public Broadcasters

make no use of the prior, agreed-upon ASCAP fee in contravention of the contemplation of the parties, to wit, directly to establish a new fee "between the parties."

B. We note, in this connection, that ASCAP'S gloss on the supposed "legislative history" of this provision is itself inadmissible. It is nothing other than the unsubstantiated legal argument of ASCAP'S counsel, finding no support in the proffered written direct testimony of any ASCAP witness. The self-serving "spin" invented by ASCAP'S counsel, as appears variously at the carry-over paragraph at pages 10-11 and the first full paragraph at page 12 of ASCAP'S brief, should be disregarded. In contrast stands the testimony of PBS'S Senior Vice President and General Counsel, Paula Jameson, who participated in each of the two prior ASCAP negotiations. That testimony soundly refutes ASCAP'S remarkable suggestion that all testimony referring to the total fee of \$            million yielded under the 1992 ASCAP and BMI agreements combined should be stricken from the record, on the ostensible ground that there is "no admissible support in the record," other than through resort to the 1992 ASCAP agreement, to support the \$            million figure. See ASCAP Opposition at 13.

Ms. Jameson's direct testimony points out that PBS's 1991 music use data served as a benchmark for determining appropriate fees in the 1992 ASCAP and BMI agreements. See Testimony of Paula A. Jameson at 5. As Ms. Jameson explains, this data indicated that ASCAP and BMI represented some        and        percent, respectively, of PBS music cues. In fact, this ratio is directly proportional to the fees upon which the parties ultimately agreed. See id. at 5-6; see also Testimony of Dr. Adam B. Jaffe at 9 n.4. Thus, even were one to examine solely the \$        per annum that the Public Broadcasters agreed to pay BMI for BMI's        percent music share,<sup>6</sup> simple mathematical extrapolation of that fee to an assumed 100 percent music use yields approximately \$        million per annum, or the very \$        million on which the Public Broadcasters rely. Thus, irrespective of ASCAP's contract argument, there exists independent evidence supporting the \$        million figure as the starting point for the Public Broadcasters' fee analysis.

---

6. Even ASCAP admits the highly probative nature of the prior BMI agreement. See ASCAP Opposition at 14 ("Indeed, [the 1992 BMI] fee may be the most relevant evidence of a reasonable BMI fee.").

C. We note finally that, in arguing for exclusion of the Public Broadcasters' references to the fees agreed to in 1992, ASCAP seeks to have it both ways. ASCAP thus states that it "has no objection to the entry of the licenses into evidence for appropriate purposes," such as "to demonstrate that agreements had been reached in the past." ASCAP Opposition at 12 n.2 (emphasis added). ASCAP notably fails to cite the Copyright Office to another purpose ASCAP apparently deems "appropriate," as found in the proffered direct testimony of Dr. Peter Boyle, ASCAP's Vice President and Chief Economist. Dr. Boyle testifies as follows:

Upon my review of certain financial and operational information addressed in ASCAP's current submission to this Panel, from an economist's perspective the current annual fee paid by public broadcasters is not in any way indicative of the value that such entities are receiving from their public performances of music from the ASCAP repertory.

Testimony of Dr. Peter M. Boyle at ¶ 5 (emphasis added).

By ASCAP's own light, it is relevant for the Panel to evaluate the economic significance of the current fees. ASCAP -- through Dr. Boyle -- has its opinion; the Public Broadcasters have theirs. Having offered such testimony from Dr. Boyle, ASCAP cannot tie the hands of the Public

Broadcasters in joining issue with Dr. Boyle's economic opinion. That is precisely what the testimony of the Public Broadcasters' consulting economist, Dr. Jaffe, does.

It is precisely this form of gamesmanship that the curative admissibility doctrine was designed to prevent. Under this doctrine, a party's prior introduction of inadmissible evidence estops that party from later objecting to the introduction of related inadmissible evidence by the other party. See generally 1 Wigmore on Evidence § 15 (Tillers rev. 1983). As one court explained:

The rule of "opening the door," or "curative admissibility," gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence.

United States v. Rosa, 11 F.3d 315, 335 (2d Cir. 1993)

(citations omitted); accord United States v. Forrester, 60 F.3d 52, 60-61 (2d Cir. 1995). This doctrine is designed to prevent undue prejudice to the party against whom the inadmissible evidence was offered in the first instance -- a dispositive consideration in and of itself here. See, e.g., United States v. Hart, 70 F.3d 854, 859 n.6 (6th Cir. 1995);

United States v. Whiting, 28 F.3d 1296, 1301 (1st Cir. 1994).

Thus, even if evidence of the parties' prior agreements were inadmissible -- which it is not given the purpose for which it has been introduced -- courts uniformly prohibit the sort of effort undertaken by ASCAP here. Put simply, ASCAP may not use the prior agreements when it suits its purpose and then cry foul when the Public Broadcasters make use of the same evidence for fundamentally the same purpose -- to evaluate the economic significance of the current fee levels.

For the reasons set forth above, ASCAP's attempt to strike evidence incorporating the fee resulting from the prior agreement between ASCAP and the Public Broadcasters for use in determining an appropriate collective outcome for these two organizations should be rejected.

# CONCLUSION

For the reasons set forth above, the relief requested in the afore-described ASCAP Objection and Motion should be denied in its entirety.

Respectfully submitted,



Neal A. Jackson  
Denise Leary  
NATIONAL PUBLIC RADIO  
635 Massachusetts Ave., N.W.  
Washington, D.C. 20004  
(202) 414-2000

R. Bruce Rich  
Garry A. Berger  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153  
(212) 310-8000

Kathleen Cox  
CORPORATION FOR PUBLIC  
BROADCASTING  
901 E Street, N.W.  
Washington, D.C. 20004  
(202) 879-9600

Gregory Ferenbach  
Ann W. Zedd  
PUBLIC BROADCASTING  
SERVICE  
1320 Braddock Place  
Alexandria, VA 22314  
(703) 739-5000

Counsel for The Public Broadcasting Service,  
National Public Radio and  
The Corporation For Public Broadcasting

Date: November 25, 1997

WEIL, GOTSHAL & MANGES LLP

767 FIFTH AVENUE • NEW YORK, NY 10153-0119

(212) 310-8000

FAX: (212) 310-8007

GENERAL COUNSEL  
OF COPYRIGHT

DEC 3 1997

RECEIVED

DALLAS  
HOUSTON  
MENLO PARK  
(SILICON VALLEY)  
MIAMI  
WASHINGTON, D.C.

BRUSSELS  
BUDAPEST  
LONDON  
PRAGUE  
WARSAW

WRITER'S DIRECT LINE  
(212) 310-8405

December 2, 1997

VIA HAND DELIVERY

Office of the Register of Copyrights  
Room LM-403  
James Madison Memorial Building  
101 Independence Avenue, S.E.  
Washington, D.C. 20540

Re: Noncommercial Educational Broadcasting Compulsory  
License (Docket No. 96-6 CARP NCBRA)

To Whom It May Concern:

Pursuant to the Order entered in this matter on October 1, 1997, the Public Broadcasters submit redacted public versions of the following documents:

- 1) Motion to Bifurcate (being filed late due to an oversight)
- 2) Response of the Public Broadcasters to ASCAP's Objection to the Public Broadcasters' Request for Bifurcated Proceedings and Motion to Strike Certain Portions of the Public Broadcasters' Direct Case Relating to the Collective Fee Stated.

Respectfully submitted,



Tracey I. Batt

cc: Counsel of Record (without enclosures)